

SERVICE DATE – JULY 27, 2015

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1232

TOWN OF NORTH JUDSON, IND.—ADVERSE DISCONTINUANCE OF SERVICE—IN  
LAPORTE, PORTER, AND STARKE COUNTIES, IND.

Digest:<sup>1</sup> This decision waives certain requirements, such as revenue and cost data, that normally pertain to discontinuance applications, but would be unnecessary to comply with should the Town of North Judson, Ind., file an application for adverse discontinuance.

Decided: July 23, 2015

In a petition filed on April 16, 2015, the Town of North Judson, Ind. (the Town), seeks waiver of certain Board regulations and exemption from related statutory provisions in connection with the filing of a third-party or “adverse” application for discontinuance authority regarding a rail line owned by the Town and operated by Chesapeake & Indiana Railroad, Inc. (CKIN). Through its application, the Town wishes to terminate CKIN’s common carrier authority over approximately 33.37 miles of rail line in LaPorte, Porter, and Starke Counties, Ind., extending between milepost CF 0.23 at or near LaCrosse and milepost 15.23 at or near Wellsboro and between milepost 212.55 at or near North Judson and milepost 230.92 at or near Malden (the Line).<sup>2</sup> The Town intends to replace CKIN with service from another operator.

On April 16, 2015, CKIN filed a letter advising the Board that it opposes the Town’s fee waiver request,<sup>3</sup> as well as the Town’s petition for waiver of certain discontinuance requirements. On May 4, 2015, CKIN filed a reply explaining what it opposes in the Town’s petition, and, on May 11, 2015, CKIN filed a motion asking that the Board compel the Town to answer discovery requests. The Town filed a reply to the motion to compel on May 20, 2015.

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> CKIN describes the Line slightly differently in its reply, stating that the Line extends between milepost CF 0.23 at or near North Judson and milepost 230.92 at or near Malden. Reply Appendix 1, May 4, 2015.

<sup>3</sup> The Board’s Chief, Section of Administration, Office of Proceedings, the agency official delegated authority to rule on filing fee waiver requests under 49 C.F.R. § 1002.2(e), ruled on the Town’s request for waiver of the filing fee.

CKIN filed a second motion to compel on May 22, 2015, and the Town filed a reply on May 27, 2015. On July 1, 2015, Co-Alliance, LLP (Co-Alliance) filed additional information related to the proceeding.

The Town's request for waivers and exemptions will be granted to the extent discussed below. The Board will address CKIN's motions to compel in a subsequent decision.

## BACKGROUND

In May 2004, the Town acquired most of the Line from CSX Transportation, Inc. (CSXT), through the Board's offer of financial assistance (OFA) process.<sup>4</sup> Shortly thereafter, in August 2004, the Town hired CKIN to provide service over the Line pursuant to a Railroad Operating Agreement, which expires on December 31, 2015.<sup>5</sup>

In its waiver petition, the Town states that it no longer wants to use CKIN's common carrier services and wishes to replace CKIN as operator of the Line on (or as soon as possible after) January 1, 2016. The Town claims that CKIN does not intend voluntarily to cease rail operations on the Line upon expiration of the Railroad Operating Agreement and that, therefore, it plans to file an adverse discontinuance application so that the Town can terminate CKIN's authority to operate over the Line.

In anticipation of filing its adverse discontinuance application, the Town seeks waivers and exemptions from the discontinuance process. The Town asserts that its requests for waivers and exemptions are similar to those that the Board has routinely granted in adverse discontinuance proceedings.

## DISCUSSIONS AND CONCLUSIONS

The Board's regulations require that abandonment and discontinuance applications conform to the requirements of 49 C.F.R. pt. 1152 subpart C. In appropriate circumstances, however, such as the filing of a third-party or adverse abandonment or discontinuance application, the Board may waive inapplicable and unneeded regulations and grant exemptions as appropriate from statutory provisions.<sup>6</sup>

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<sup>4</sup> The Board notes that it previously granted the Town authority to acquire, and CKIN authority to operate over, only 32.97 miles of the Line, extending from milepost CF 0.63, at LaCrosse, to milepost CF 15.23, at Wellsboro, and from milepost CI 212.55, at North Judson, to CI 230.92, at Malden. See e.g., CSX Transp., Inc.—Aban. Exemption—in LaPorte, Porter, & Starke Cntys., Ind., AB 55 (Sub-No. 643X) (STB served Apr. 28, 2004). The Town would need to address this discrepancy if it files its application for adverse discontinuance.

<sup>5</sup> Chesapeake & Ind. R.R.—Operation Exemption—Town of North Judson, Ind., FD 34529 (STB served Aug. 20, 2004).

<sup>6</sup> See Riverview Trenton R.R.—Adverse Aban.—in Wayne Cnty., Mich. (Riverview), AB 1230 (STB served Apr. 10, 2015); Lackawaxen-Honesdale Shippers Ass'n—Adverse

(continued . . . )

System Diagram Map. The Town requests waiver of the requirements at 49 C.F.R. §§ 1152.10-14, which relate to filing and amending of, and providing notice to the public through, a carrier's system diagram map (SDM), and establish a two-month waiting period between amendments of the SDM and the filing of a corresponding discontinuance application. The Town also requests waiver of 49 C.F.R. § 1152.22(a)(5), which requires reference to inclusion of the rail line subject to the discontinuance request on the carrier's SDM or narrative, the date on which the line was first listed there for abandonment or discontinuance, and a copy of the line description that accompanies the carrier's map. The Town further seeks an exemption from the corresponding statutory SDM requirements of 49 U.S.C. § 10903(c)(2). In support, the Town contends that the Board normally waives these requirements where an adverse discontinuance is intended to result only in a change of operators.

CKIN opposes the Town's requests concerning the SDM. CKIN states that the SDM requirement is needed to give customers and the entities that funded the Town's purchase of the Line in 2004 sufficient time to strategize regarding the Line's future. The Town, however, has already served its petition for waiver on the Indiana DOT, LaPorte, Porter, and Starke Counties, and shippers on the Line, among others. Moreover, waiver of these SDM requirements is customary in adverse proceedings where the adverse discontinuance is intended to result only in a change of operators, as would be the case here. See, e.g., Lackawaxen, slip op. at 2-3; Stewartstown R.R.—Adverse Aban.—in York Cnty., Pa., AB 1071, slip op. at 4 (STB served Mar. 10, 2011); Bos. & Me. Corp.—Adverse Discontinuance—New Eng. S. R.R. (Bos. & Me. Corp.), AB 32 (Sub-No. 100), slip op. at 2-3 (STB served Feb. 12, 2008). We, therefore, find CKIN's objection without merit and will waive the SDM requirements.

Line Attributes. The Town requests waivers of 49 C.F.R. § 1152.22(b), (c), (d), and (e), which require that discontinuance applications include information regarding the condition of properties, service performed, attributable revenue and cost data, and rural and community impact. The Town contends that this information is not necessary where, as here, there will only be a change of operators and not a complete discontinuance of service. The Town also states that the revenue and cost data requirements are intended to apply only to "carriers that seek to discontinue their own operations on the ground that such operations are a burden on interstate commerce."<sup>7</sup> CKIN does not oppose waiver of the requirements at 49 C.F.R. § 1152.22(b)-(e). The Town is correct that such information is unnecessary here. We therefore will grant the Town's unopposed request for waiver of these regulatory requirements. Lackawaxen, slip op. at 3.

Environmental and Historic Impacts. The Town seeks waiver of the environmental and historic reporting requirements at 49 C.F.R. § 1152.20(c), 49 C.F.R. § 1105.7, and 49 C.F.R. § 1105.8, as well as any further exemptions or waivers that may be necessary to confirm that the

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Discontinuance of Operating Auth.—in Wayne & Pike Cntys., Pa. (Lackawaxen), AB 1110 (STB served Jan. 23, 2014).

<sup>7</sup> Pet. 5.

environmental and historic reporting requirements are inapplicable to this proceeding. The Town contends that these requirements should be waived because the proposed adverse discontinuance would not result in changes that exceed the thresholds in 49 C.F.R. § 1105.7 and 49 C.F.R. § 1105.8.

CKIN objects to waiver of the environmental and historic reporting requirements. According to CKIN, the Town has not formally begun soliciting other short line rail operators to replace CKIN. Therefore, CKIN notes, if the Board were to authorize adverse discontinuance, there could be a lapse in operations on the Line tantamount to an adverse abandonment. CKIN also suggests that at least one historically significant structure might exist on the Line.

Although CKIN argues that this proceeding is tantamount to an adverse abandonment, the Town has stated that it intends to continue operations over the Line with another operator on or around January 1, 2016.<sup>8</sup> Because this proceeding is intended ultimately to result merely in a substitution of operators and would not result in operations that would exceed the thresholds in 49 C.F.R. § 1105.7, it is not tantamount to an adverse abandonment, and it is appropriate to waive the need to prepare environmental documentation under 49 C.F.R. § 1105.6(c)(2)(ii). There is no evidence that the Town intends to salvage or alter the Line or disrupt historic structures. Therefore, the historic report requirements will also be waived for this proceeding under 49 C.F.R. § 1105.8(b)(1). Lackawaxen, slip op. at 3.

Filing, Notice, and Posting Requirements. The Town requests waiver of various filing, notice, and posting requirements in anticipation of filing an application for adverse discontinuance. First, the Town seeks partial waiver of the filing and notice requirements of 49 C.F.R. § 1152.20(a)(1) and (2), and the time-filing requirements of 49 C.F.R. § 1152.20(b)(1). Specifically, the Town asks that this waiver petition be permitted to serve as the notice of intent to discontinue service as required under 49 C.F.R. § 1152.20 and that it be permitted to serve its waiver petition only on the following entities: (1) CKIN (the incumbent rail carrier); (2) Co-Alliance and Kova Ag Products (the two active shippers on the Line); (3) CSXT and Norfolk Southern Railway Company (the connecting carriers); (4) the Governor, the Indiana DOT, and the Indiana Utility Regulatory Commission; (5) the LaPorte Commissioners, Porter Commissioners, and Starke Commissioners; (6) the Hoosier Valley Railroad Museum; and (7) the United States Railroad Retirement Board. The Town states that service of the waiver petition on these entities, combined with three weeks of newspaper publication and a Federal Register notice, satisfies procedural due process.

CKIN opposes the Town's request that its petition for waiver serve as its notice of intent under 49 C.F.R. § 1152.20(a)(1) and the Town's request for waiver of the related time-filing requirements found at 49 C.F.R. § 1152.20(b)(1). With respect to the request for waiver of

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<sup>8</sup> The Board notes that CKIN is seeking to compel information to this effect from the Town. Mot. to Compel 3-4, May 11, 2015. In its reply opposing that motion, the Town argues that its application would not be tantamount to an adverse abandonment because it will ask the Board to condition a grant of discontinuance authority so that discontinuance authority could not be exercised until a new operator is ready to begin service.

49 C.F.R. § 1152.20(a)(1) and (b)(1), CKIN raises concerns about inadequate notice to shippers and the community. However, the Board finds that serving the current petition on the parties listed in the paragraph above is sufficient to alert them of the forthcoming application. We will therefore grant the Town's request for waiver of the requirements of 49 C.F.R. § 1152.20(a)(1) and (b)(1).

We will also grant the Town's request for partial waiver of the notice requirements of 49 C.F.R. § 1152.20(a)(2). In addition to the entities listed above, the Board will require the Town to serve a copy of its petition for waiver on the headquarters of all duly certified labor organizations that represent employees on the Line, if any. See 49 C.F.R. § 1152.20(a)(2)(ix) & (xii). See also Lackawaxen, slip op. at 4.

Additionally, the Town requests waiver of the Board's notice requirements found at 49 C.F.R. § 1152.24(c), to the extent such requests were granted in Lackawaxen. This request is reasonable and unopposed. We will therefore only require that the Town serve its adverse discontinuance application on all connecting rail carriers, CKIN, the Indiana DOT, and the Indiana Utility Regulatory Commission.

Finally, the Town requests waiver of 49 C.F.R. § 1152.20(a)(3), which requires posting a copy of the notice of intent at each agency station and terminal on the line, and exemption from the corresponding statutory requirement at 49 U.S.C. § 10903(a)(3)(B). CKIN clearly challenges the termination of its operations on the Line and this proceeding and likely would not permit the Town on the property to post the required notices. Therefore, we will grant the Town's request. See Lackawaxen, slip op. at 4; Bos. & Me. Corp., slip op. at 4.

Offers of Financial Assistance. The Town asks for exemption from 49 U.S.C. § 10904 and waiver of the corresponding regulations at 49 C.F.R. § 1152.27, which govern OFAs to continue rail service. The Town contends that these procedures are not necessary to carry out the rail transportation policy (RTP) of 49 U.S.C. § 10101 because the Town wishes to have operations continue on the Line. CKIN objects to the Town's request for waiver of 49 U.S.C. § 10904 on grounds that waiver of the OFA provisions would preclude interested shippers from making an offer to retain CKIN as operator of the Line.

Waiver of the OFA regulations, however, does not foreclose shippers or other interested persons from participating in a Board proceeding concerning an adverse discontinuance application. If the Town were to file an adverse discontinuance application, shippers on the Line could oppose the replacement of CKIN without employing the OFA process. Moreover, if the Board were to permit the discontinuance of CKIN's operations over the Line in this proceeding, an OFA to subsidize CKIN's continued operations would in effect nullify the Board's decision. See Riverview, slip op. at 6. For these reasons, the Board will waive the OFA regulations at 49 C.F.R. § 1152.27.

Public Use. The Town requests exemption from the public use provision of 49 U.S.C. § 10905 and the related regulations at 49 C.F.R. § 1152.28. The request is unnecessary because public use requirements do not apply to discontinuances. See Ind. Bus. R.R.—Adverse

Discontinuance of Rail Serv.—Portion of Norfolk S. Ry.’s Rockport Branch, AB 1044, slip op. at 4 (STB served Nov. 30, 2009). Consequently, this request will be denied as moot.

Federal Register Notice. The Town requests a limited waiver of 49 C.F.R. § 1152.22(i), which prescribes the wording for the draft Federal Register notice that an applicant must submit to the Board. CKIN opposes the Town’s draft Federal Register notice and asks that the Board require the Town to use the notice attached to CKIN’s reply.

We will deny the Town’s request because, instead of proposing to submit a variation on the Federal Register notice form found at 49 C.F.R. § 1152.22(i), the Town has submitted a version of a notice of intent to abandon at 49 C.F.R. § 1152.21. If the Town files its application for adverse discontinuance, it should submit a version of the Federal Register notice that conforms to 49 C.F.R. § 1152.22(i) and this decision.

Exemption Criteria. As indicated, the Town seeks, and the Board will grant, exemption from the following statutory provisions corresponding to the Board regulations previously discussed: 49 U.S.C. § 10903(c)(2) (SDMs); 49 U.S.C. § 10903(a)(3)(B) (Posting); and 49 U.S.C. § 10904 (OFAs). We will grant these exemptions because full compliance with the Interstate Commerce Act is not necessary here to carry out the RTP of 49 U.S.C. § 10101. The exemptions would promote the RTP by eliminating unnecessary procedures, and thus would expedite regulatory decisions (§ 10101(2)), foster sound economic conditions in transportation (§ 10101(5)), and encourage honest and efficient management of railroads (§ 10101(9)). Other aspects of the RTP would not be adversely affected. Further, application of the statutory provisions we are exempting here is not necessary to protect shippers from an abuse of market power because the Town seeks to have service continue over the Line using a different operating carrier.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for waivers and exemptions is granted to the extent discussed above.
2. The decision is effective on its service date.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Miller.